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Revisiting the Scrap Heap: The Decline and Fall of Smith v. F.W. Morse & Co.

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Revisiting the Scrap Heap: The Decline and Fall of *Smith v. F.W. Morse & Co.*

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I. INTRODUCTION

One of the more difficult tasks facing a federal court is trying to predict how a state's highest court would rule on a question of law it has not yet addressed.[1] That difficulty is well illustrated by the history of *Wenners v. Great State Beverages, Inc*.,[2] and in particular, the interpretation of that opinion contained in *Smith v. F.W. Morse & Co.*[3]

Smith's interpretation of *Wenners* is highlighted by its footnote number eleven, and while footnote eleven is no footnote four,[4] it is a notable statement in its own right:

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1. Of course, to resolve the thorniest of those issues, the ones that sprout in truly unplowed ground, a federal court can certify a question of law to a state's highest court.

2. 663 A.2d 623 (N.H. 1995).

3. 76 F.3d 413 (1st Cir. 1996).

4. Footnote four of *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), is, arguably, the most influential footnote in American jurisprudence.

> Nothing could be easier than to collect tributes to the footnote's great fame. Justice Powell called it "the most celebrated footnote in constitutional law." For Peter Linzer, it is "the most famous footnote in constitutional law." In his entry on the footnote in the Encyclopedia of American Constitutional Law, Aviam Soifer calls it "undoubtedly . . . the best known, most controversial footnote in constitutional law." Michael Dorff and Samuel Isacharoff go further, calling it "the most famous footnote in all of law." Geoffrey Miller says that "any second-year law student knows" it to be "the most renowned footnote in constitutional history." Thomas Simon calls it "notorious." Morton Horwitz just calls it "famous." J.M. Balkin calls it simply "The Footnote" and can be sure his readers understand the reference.

Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. Tex. L. Rev. 163, 168-69 (2004) (quoting Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 Colum. L. Rev. 1087, 1087 (1982); Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely v. Harlan Fiske Stone*, 12 Const. Comment. 177, 177 (1995); Aviam Soifer, *Footnote Four in United States v. Carolene Products Company*, Ency. of Am. Constitutional L. 213-14 (Leonard W. Levy et al. eds., Macmillan Publg. Co. 1986); Michael C. Dorff & Samuel Isacharoff, *Can Process Theory Constrain Courts*, 72 U. Colo. L. Rev. 923, 926 (2001); Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 S. Ct. Rev. 397, 397 (1987); Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. Miami L. Rev. 107, 123 (1990); Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 252 (Oxford U. Press 1992); J.M. Balkin, *The Footnote*, Nw. U. L. Rev. 275, 275 (1989)).

> To the extent that either *Kopf v. Chloride Power Electronics, Inc.*, 882 F. Supp. 1183, 1189-90 (D.N.H. 1995), or *Godfrey v. Perkin-Elmer Corp.*, 794 F. Supp. 1179, 1187 (D.N.H. 1992), hold otherwise, *Wenners* [*v. Great State Beverages, Inc.*, 663 A.2d 623 (N.H. 1995)] consigns them to the scrap heap.[5]

The portion of *Wenners* that, in the view of the *Smith* majority,[6] abrogated *Kopf* and *Godfrey* is the statement that "a plaintiff may not pursue a common law remedy where the legislature intended to replace it with a statutory cause of action."[7] While that statement seems simple enough, there is more to *Smith*'s reference to *Wenners* than meets the eye.

This article begins with a close examination of *Wenners* and the two opinions on which *Wenners* relied for its now-canonical statement of the relationship between statutory and common law remedies. I continue with a discussion of *Smith* and the two opinions that *Wenners* purportedly consigned to the scrap heap. The next section explores the two distinctly different shadows cast by *Wenners*, one in the United States District Court for the District of New Hampshire, the other in the New Hampshire Supreme Court. I conclude by suggesting that, in light of *Bliss v. Stow Mills, Inc.*,[8] the scrap heap may be due for a changing of the guard, with *Smith* replacing *Godfrey*.

II. *WENNERS* AND ITS PRECURSORS

In *Wenners*, the plaintiff, David Wenners, was an employee of the defendant, Great State Beverages ("Great State").[9] After Wenners declared personal bankruptcy, "[t]he chief executive officer of Great State and/or his son, the president of Great State, asked [Wenners] to turn over assets to either or both of them in contravention of a bankruptcy court order, which [Wenners] refused to do."[10] As a result, he was fired.[11] In response,

5. *Smith*, 76 F.3d at 429 n. 11.

6. Judge Selya wrote the majority opinion. Judge Bownes wrote a concurring opinion because he was "troubled by the analysis used in deciding the Title VII claim," *id*. at 429 (Bownes, J., concurring), but his concurrence says nothing about *Wenners* or the wrongful discharge claim, leading to the presumption that he concurred with both the result reached in Judge Selya's opinion, and the reasoning that led to the result.

7. 663 A.2d at 625 (citing *Howard v. Dorr Woolen Co.*, 414 A.2d 1273, 1274 (N.H. 1980); *Thompson v. Forest*, 614 A.2d 1064, 1065-66 (N.H. 1992)).

8. 786 A.2d 815 (N.H. 2001).

9. 663 A.2d at 625.

10. *Id.*

11. *Id.*

he filed suit, asserting a claim for wrongful termination.[12] Under the common law of New Hampshire, both today and at the time *Wenners* was decided, a plaintiff claiming wrongful termination has the burden of proving:

> [O]ne, that the employer terminated the employment out of bad faith, malice, or retaliation; and two, that the employer terminated the employment because the employee performed acts which public policy would encourage or because he refused to perform acts which public policy would condemn.[13]

According to Wenners, he had a claim for wrongful termination because "his termination was the result of his bankruptcy filing and/or his refusal to comply with the demands to turn over the assets."[14]

Great State moved to dismiss, arguing, in part, that Wenners was barred from bringing a common law claim because: (1) "where a statutory remedy exists, no common law cause of action can lie;"[15] and (2) Wenners had "a valid statutory remedy under the United States Bankruptcy Code."[16] The superior court denied Great State's motion to dismiss,[17] and Great State filed an interlocutory appeal.[18] The New Hampshire Supreme Court affirmed.[19]

In his opinion for a unanimous court, Justice Horton characterized Great State's argument in the following way: "The defendant, citing *Howard v. Dorr Woolen Company*, . . . argues that where a statutory remedy exists, no common law cause of action can lie."[20] In affirming the trial court, the Supreme Court did not adopt the defendant's statement of the law – i.e., that the mere existence of a statutory remedy precludes a com-

12. *Id*. at 624. Courts appear to use the terms "wrongful termination" and "wrongful discharge" interchangeably.

13. *Id*. at 625 (citing *Short v. Sch. Admin. Unit No. 16*, 612 A.2d 364, 370 (N.H. 1992)).

14. *Id*.

15. *Id*. (citing *Howard*, 414 A.2d at 1274).

16. *Id*. (citing 11 U.S.C. §§ 105(a) and 525(b) (1988)). Regarding the content of those statutory provisions:

> Section 525(b) bars private employers from terminating or discriminating with respect to the employment of a debtor or bankrupt under the act solely because such debtor or bankrupt has filed for bankruptcy, failed to pay a debt that is dischargeable, or been discharged under the act. 11 U.S.C. § 525(b). Section 105(a) permits the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

Id.

17. *Id*.

18. *Id*.

19. *Id*. at 626.

20. *Id*. at 625 (citation omitted).

mon law cause of action – holding, instead, that "[w]hile a plaintiff may not pursue a common law remedy where the legislature intended to replace it with a statutory cause of action,"[21] the case before it involved "*no clear statutory intent* to supplant the common law cause of action."[22] After rejecting Great State's preclusion argument, the Court went on to separately analyze, and reject, Great State's argument that Wenners's wrongful termination claim was preempted by federal bankruptcy law.[23]

For the rule that a plaintiff has no common law remedy when the legislature intended to replace such a remedy with a statutory cause of action, the Court cited both *Howard*,[24] another wrongful termination case,[25] and *Thompson v. Forest*,[26] a negligence case that implicated the statutory tort claim bar incorporated into the New Hampshire workers' compensation statute.[27] But before turning to *Howard* and *Thompson*, there are four points to make about *Wenners*.

First, the rule stated by the Court in *Wenners* was not the rule proposed by the defendant; Great State's rule required only the existence of a statutory remedy to abrogate the common law, not an expression of legislative intent to supplant the common law.[28] Second, because the Bankruptcy Code provided *no* statutory remedy for David Wenners, Great State could

21. *Id*. (citations omitted).

22. *Id*. (emphasis added, citation omitted). In so holding, the Court explained that "'Section 525(b) [of the Bankruptcy Code] *provides no remedy* for violation by a private employer,' . . . *nor does it set forth procedures* or refer to any other section of the Code." *Id*. (emphasis added). Thus, § 525(b) failed to satisfy not only the rule stated by the Court in *Wenners* (that there is no common law remedy when the legislature intended to replace it with a statutory cause of action), but also the more defendant-friendly rule proposed by Great State and rejected by the Court (the existence of a statutory remedy eliminates the availability of a common law cause of action).

23. *Id*. at 625-26.

24. *Id*. at 625.

25. *Howard*, 414 A.2d at 1273.

26. *Wenners*, 663 A.2d at 625.

27. *Thompson*, 614 A.2d at 1065.

28. Unlike some legal hair-splitting, this is a distinction with a difference, as there are some areas of the law in which common law and statutory remedies do co-exist. For example, in New Hampshire, "[i]ndividuals injured by unfair trade practices may seek a remedy for [such] injury under common law or other New Hampshire statutes; they need not seek a remedy under the [New Hampshire Consumer Protection Act]." *Transmedia Rest. Co. v. Devereaux*, 821 A.2d 983, 991 (N.H. 2003) (construing N.H. Rev. Stat. Ann. § 358-A:12 (1995)) (citations omitted). Thus, the mere existence of a statutory remedy is legally inadequate to eliminate a common law cause of action.

Given that statutory enactments can explicitly abrogate common law rights, as in the area of workers' compensation, *see* N.H. Rev. Stat. Ann. § 281-A:8 (1999 & Supp. 2001), can contain a clause that saves common law causes of action, as in the areas of consumer protection, *see* N.H. Rev. Stat. Ann. § 358-A:12, and whistleblower protection, *see* N.H. Rev. Stat. Ann. § 275-E:5 (1999), or can be silent on the question of the relation between statutory and common law rights, an interesting question arises concerning statutes that fall into the third category, and whether their enactment, without more, expresses a legislative intent to replace a common law remedy with a statutory cause of action. *But see Niemi v. Boston & Me. R.R.*, 173 A. 361, 366 (N.H. 1934) ("The legislative purpose is that the common law shall be maintained except as its change is ordered, and the purpose to change should fairly appear.").

not even satisfy the precondition for invoking its own rule, making it unnecessary for the Court even to state its more stringent one, and seemingly casting that statement into the category of dictum.[29] Third, after it rejected Great State's argument that Wenners's common law cause of action was precluded by the existence of a statutory remedy, the Court conducted a separate preemption analysis.[30] Fourth, and perhaps most importantly, appearances and subsequent history to the contrary,[31] the rule stated in and attributed to *Wenners* is not, and could not be, a statement of the common law of New Hampshire. Rather, it is merely a legal truism derived from the inherent power of the legislature to abrogate the common law.[32] On that basis, it was unnecessary, and perhaps unnecessarily confusing, for the opinion in *Wenners* to cite *Howard* and *Thompson* as authorities for its superfluous legal truism.

In *Howard*, the defendant did win dismissal of the plaintiffs' common law wrongful discharge claims – and held its judgment on appeal – but *not* through application of the rule attributed to *Howard* by the *Wenners* Court. "The principal issue [in *Howard* was] whether either the widow or estate of the decedent [was] entitled to damages, including the value of a group term life insurance policy, for an alleged wrongful discharge by the defendant."[33] The administrator of the decedent's estate alleged, *inter alia*, "that the defendant discharged [the decedent] because of his age [and] his suffering from a debilitating case of angina."[34]

Regarding the administrator's claim that the decedent had been terminated because of his age and ill health, the Supreme Court held:

> We also find the administrator's reliance upon *Monge v. Beebe Rubber Co.*, [316 A.2d 549 (N.H. 1974)], for the proposition that a discharge due to age or sickness warrants recovery is misplaced. We construe *Monge* to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy

29. The *Wenners* rule appears to be dictum because Great State's argument did not fail due to the existence of a statutory cause of action intended by Congress to co-exist with common law remedies; it failed because the Bankruptcy Code provides *no* private remedies whatever.

30. *Wenners*, 663 A.2d at 625-26.

31. *See e.g. Bliss*, 786 A.2d at 820 (referring to "the common law rule cited in *Wenners*").

32. The status of the *Wenners* rule as a legal truism rather than an actual common law rule is perhaps best illustrated by the fact that unlike true common law rules, which are subject to judicial revision, the *Wenners* rule could never be overruled by the New Hampshire Supreme Court. That is, there is no circumstance – short of a legislative act undertaken in an unconstitutional way – in which the Supreme Court could ever rule that a plaintiff *may* pursue a common law remedy when the legislature intended to replace such a remedy with a common law cause of action.

33. *Howard*, 414 A.2d at 1273.

34. *Id*. at 1274.

> would condemn. *See e.g. Nees v. Hocks*, 536 P.2d 512 (1975) (employee discharged for accepting jury duty); *cf. Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). A discharge due to sickness does not fall within this category, and is generally remedied by medical insurance or disability provisions in an employment contract. Nor does discharge because of age fall within this narrow category. The proper remedy for an action for unlawful age discrimination is provided for by statute. *See* RSA 354-A:8 I (Supp.1979); RSA 354-A:9; 29 U.S.C. § 623 (1976); 29 U.S.C. § 626 (1976). Accordingly, the administrator's claim must fail on the basis of his pleadings.[35]

A careful reading of *Howard* reveals that the rule ascribed to that opinion by *Wenners* – a common law remedy is not available when the legislature intended to replace that remedy with a statutory cause of action – is nowhere to be found. Rather, according to the *Howard* Court, the plaintiffs in that case did not state a wrongful discharge claim because the two "acts" by the decedent for which he was allegedly fired – getting sick and getting old – were not acts that public policy would encourage. Obviously, the Court did mention various remedies available to those discharged on account of sickness or old age, but it did not say – nor could it have said – that the statutory cause of action for age discrimination was a legislative replacement for a common law wrongful discharge claim based upon age, because, as the Court explained, discharge due to old age simply does not fall into the narrow category of discharges for performing an act encouraged by public policy. In other words, age-discrimination statutes are not a replacement for a common law remedy for wrongful discharge because there *is no* common law remedy for discharge due to old age.

Unlike the defendant/appellant in *Wenners*, who cited only *Howard*, the *Wenners* Court also cited *Thompson* as a source for the rule it stated.[36] *Thompson*, decided about a dozen years after *Howard*, involved a negligence claim that the defendants moved to dismiss, on grounds that it was barred by the workers' compensation statute.[37] The principal holding of *Thompson* is that an allegation of "willful, wanton and reckless" conduct by a co-employee does not state an intentional tort claim and, as a consequence, is barred by the Workers' Compensation Law.[38] Along the way toward reaching that conclusion, the *Thompson* Court devoted considerable attention to the interplay between the common law of torts and the New

35. *Id.* (parallel citations omitted).
36. 663 A.2d at 625.
37. 614 A.2d at 1065-66.
38. *Id.* at 1068 (citing N.H. Rev. Stat. Ann. § 281-A:8, I(b) (Supp. 1991)).

Hampshire workers' compensation statute, explaining that "[i]n recognition of the burdens, delays, inadequate relief and unequal operation of law inherent in common law remedies, the Workers' Compensation Law was designed to substitute for unsatisfactory remedies in tort a liability without fault with limited compensation capable of ready and early determination."[39] While *Thompson* does not state, as a general rule, that a common law remedy is precluded when the legislature intended to replace it with a statutory cause of action, such a rule is reasonably inferred from the holding in that case, which, in turn, is rooted in the Workers' Compensation Law, which states the intent of the legislature that "an employee of an employer subject to this chapter shall be conclusively presumed . . . to have waived all rights of action whether at common law or by statute or provided under the laws of any other state or otherwise."[40]

In any event, as between *Howard* and *Thompson*, *Thompson* seems to be the more plausible source for the rule stated in *Wenners*. Any suggestion to the contrary, even by Justice Horton in *Wenners*, would appear to be based upon a misreading of *Howard*, which mentioned the availability of alternative remedies, some of them statutory, but simply did not turn on the legislature's intent to create an exclusive statutory remedy.[41] However, if *Thompson* is, indeed, the source of the rule stated in *Wenners*, it is important to bear in mind that the statutory replacement for common law remedies in *Thompson* explicitly bars common law causes of action, which at least suggests that the rule in *Wenners* would only apply in other situations in which a proposed statutory replacement for a common law remedy explicitly bars common law remedies.

III. *SMITH* AND THE SCRAP HEAP

In *Smith*, the opinion in which Judge Selya installed a scrap heap in footnote eleven, an employee who was discharged sued her former employer, asserting claims of "wrongful discharge based on gender discrimination, intentional infliction of emotional distress, and breach of contract,"[42] along with a claim of gender/pregnancy discrimination under Title VII.[43] At an early stage in the proceedings, the district court granted the

39. *Id.* at 1066 (quoting *Estabrook v. Am. Hoist & Derrick, Inc.*, 498 A.2d 741, 744 (N.H. 1985) (citation and internal quotation marks omitted)).

40. N.H. Rev. Stat. Ann. § 281-A:8, I (1999).

41. It would be pure speculation to delve into the reasons why Justice Horton identified *Howard* as the source for a rule so well grounded in *Thompson*, but perhaps it seemed necessary, in a wrongful discharge case, to ground the rule in another wrongful discharge case.

42. 76 F.3d at 419.

43. *Id.*

defendant's motion for summary judgment on the wrongful discharge claim.[44] In the words of Judge Selya, "[i]n the court below, Judge Stahl ruled that when a statutory remedy is available, New Hampshire courts would not entertain a complaint that an at-will employee had been wrongfully discharged in violation of public policy."[45]

In affirming Judge Stahl, the *Smith* majority construed the New Hampshire Supreme Court's disposition of the age-based wrongful discharge claim in *Howard* in the following way: "A discharge due to age fell outside this 'narrow category' [of discharges cognizable under the common law of wrongful discharge] *inasmuch as* the 'proper remedy for an action for unlawful age discrimination is provided for by statute.'"[46] The problem with that reading of *Howard* is that the logical linkage suggested by the phrase "inasmuch as" does not appear in *Howard*. Rather, *Howard* said first that termination for age fell outside the narrow category of discharges cognizable under the rubric of wrongful discharge and then stated, *entirely independently*, that a statutory remedy was available for such discharges. But *Howard* did not say that the availability of a statutory remedy was the reason why a common law cause of action was foreclosed to the plaintiff in that case – *Howard* most likely would have been decided the same way even if a statutory remedy were not available for age discrimination – and the opinion in *Smith* said nothing, explicitly, about the intent of the New Hampshire legislature in enacting the state age-discrimination statute,[47] or the intent of the United States Congress in enacting federal gender-discrimination laws.[48] In other words, the majority in *Smith* appears to have misread *Howard* in the same way the *Wenners* Court did.

Based upon that misreading of *Howard* – or its reliance on *Wenners* – the *Smith* majority ruled that "the existence of such a [statutory] remedy [for gender discrimination, in the form of Title VII] preclude[d] the appellant, in the circumstances of [that] case, from asserting a common law claim for wrongful discharge."[49] Several things are noteworthy about that holding.

First, while the *Smith* majority accurately recited the holding from *Wenners* that "a plaintiff may not pursue a common law remedy where the legislature intended to replace it with a statutory cause of action,"[50] its own holding cited to the more expansive statement of that rule, provided by the

44. *Id*. (citation omitted).
45. *Id*. at 428.
46. *Id*. (quoting *Howard*, 414 A.2d at 1274 (emphasis added)).
47. N.H. Rev. Stat. Ann. § 354-A:8, I (Supp. 1979); N.H. Rev. Stat. Ann. § 354-A:9 (1989).
48. 29 U.S.C. §§ 623, 626 (1976).
49. 76 F.3d at 429.
50. *Id*. (citation omitted).

defendant in *Wenners*, which spoke only of the existence of a statutory remedy, without mentioning the intention of the legislature to replace the common law remedy with a statutory remedy.[51] Second, there was no need, in *Smith*, to invoke the rule purportedly derived from *Howard* by the *Wenners* Court. Just as getting old and getting sick do not fall into the narrow category of circumstances covered by the tort of wrongful discharge, because getting old and getting sick are not acts encouraged by public policy, being a woman and being pregnant also fall outside that category, as neither is an act encouraged by public policy. In other words, the reasoning stated by the *Howard* Court, rather than the phantom rule purportedly derived from *Howard* by the *Wenners* Court, would have provided a fully adequate basis for deciding *Smith*.

Third, without acknowledging the *Wenners* Court's observation that in the case before it, there was "no clear statutory intent to supplant the common law cause of action,"[52] the United States Court of Appeals for the First Circuit appears to have derived from *Wenners*, albeit rather implicitly, a test for determining whether the legislature intended to replace a common law remedy with a statutory cause of action. Specifically, the *Smith* majority seems to have construed the *Wenners* Court's observations that the Bankruptcy Code provided no remedies for persons in Wenners's position and set forth no procedures for pursuing such remedies to be an affirmative statement that when the legislature *does* "creat[e] a private right of action . . . and limns a mature procedure for pursuing such an action,"[53] those legislative acts, without more, signal a legislative intent to supplant common law causes of action. Whether the *Wenners* Court actually intended to establish the rule the First Circuit ascribes to the *Wenners* opinion is, at best, an open question, but it seems unlikely.[54] Indeed, it appears that the *Smith* majority transformed one rule, common law is displaced by statute if the legislature so intends, into a substantially different one: common law is displaced by any statute in which the legislature does not state its intention not to displace the common law. Among other things, *Smith*'s

51. *Id.*

52. *Wenners*, 663 A.2d at 625.

53. *Smith*, 76 F.3d at 429.

54. Logically speaking, the *Smith* majority took "if not x, then not y" to mean "if x, then y," but of course those two statements are not logical equivalents. If an object is not a fruit, it is surely not an apple, but just because an object is a fruit, that alone is not enough to make it an apple. Applied to the particulars of *Smith* and *Wenners*, a legislature that creates no statutory remedy plainly does not intend to replace a common law remedy with a statutory one, but, on the other hand, a legislature can create a statutory remedy without intending for that statutory remedy to replace any other remedies available under the common law. Because of the logical fallacy in the *Smith* analysis, the opinion stopped short of determining, under preemption principles, whether Congress intended for Title VII to replace any common law remedies that might be available under state law.

test for "statutory preclusion"[55] sets a lower threshold for finding legislative intent to replace common law remedies than standard preemption principles set for finding Congressional intent to supplant state law. While the doctrine of preemption requires Congress to clearly signal its intent to supplant state law, the *Smith* test allows preclusion unless the legislature expressly disclaims any preclusive intent. Had the *Smith* majority paid more attention to *Thompson*, which is the only plausible source of case law support for the *Wenners* rule,[56] it might not have been so quick, in the context of Title VII, to take away Smith's common law cause of action. *Thompson* involved a statute with a provision that expressly displaced common law remedies. Title VII, the statute at issue in *Smith*, contains no such provision.[57]

In addition to invoking the *Wenners* rule when it could have, and probably should have relied upon the reasoning of *Howard*, *Smith* states, in footnote eleven, that *Wenners* consigned *Kopf* and *Godfrey* "to the scrap heap," to the extent either of those opinions contained holdings that were contrary to *Wenners*.[58] Leaving aside, for the moment, the question of whether the *Wenners* dictum has the power to consign anything to the scrap heap, there is the further question of just how much of *Kopf* and *Godfrey* remain after *Smith*. As between *Kopf* and *Godfrey*, Judge Devine's decision in *Godfrey* appears to have taken a bigger hit from footnote eleven than his decision in *Kopf*.

In *Godfrey*, an employee complained of sexual harassment and sued her employer and three of its employees, asserting a claim under Title VII as well as state law claims for wrongful discharge, intentional and negligent infliction of emotional distress, and slander.[59] The defendants moved to dismiss the wrongful discharge claim – which was premised upon a constructive discharge arising from a hostile work environment – arguing "that a wrongful discharge claim cannot be premised upon a public policy embodied in a statute which provides a remedy for its violation [and that] . . .

55. 76 F.3d at 429 n. 12.

56. And, as I have suggested previously, it is incorrect to think of the *Wenners* rule as requiring case law support, as it is not really a common law rule.

57. To the contrary, Title VII – like New Hampshire's Whistleblower's Protection Act and Consumer Protection Act – includes a saving clause. According to that provision:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7 (1964).

58. *Smith*, 76 F.3d at 429 n. 11.

59. 794 F. Supp. at 1182.

the availability of remedies under Title VII precludes a wrongful discharge action premised on sexual harassment."[60] Judge Devine disagreed, and denied the motion to dismiss, pointing out that the defendants' "argument . . . ignore[d] the clarification in *Cloutier* that the public policy exceptions [supporting a wrongful discharge claim] may be either statutory or non-statutory in nature."[61] While Judge Devine framed the issue in *Godfrey* in terms of the source of the public policy supporting a wrongful discharge claim, as opposed to the availability or exclusivity of a statutory remedy, it is easy to see why *Smith*'s footnote eleven cast *Godfrey* onto the scrap heap; its result is directly the opposite of that reached in *Smith*, which was another Title VII case.

Kopf, however, is another story. The plaintiff in *Kopf* was terminated from his employment by the defendant when he was fifty-eight years old, approximately four months after he injured himself in a non-work-related fall from a ladder.[62] He sued under the Age Discrimination in Employment Act of 1987[63] and the Americans with Disabilities Act of 1990 ("ADA")[64] and also asserted state law claims for, *inter alia*, wrongful termination.[65] The defendant employer moved to dismiss, and Judge Devine granted the motion as to the wrongful termination claim, explaining that "[f]or at least fifteen years, New Hampshire courts have indicated that disability or age are not acts that an employee performs or refuses to perform and thus fail to meet the public policy benchmark."[66] Based upon Judge Devine's faithful adherence to *Howard*, and *Wenners*' reliance upon that same case, there appears to be no extent to which *Kopf* runs afoul of *Wenners* (or *Smith*) and, therefore, it is difficult to see why *Kopf* was sent off to sleep with the scraps.[67]

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60. *Id.* at 1187.

61. *Id.* (citing *Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1141 (N.H. 1981)).

62. 882 F. Supp. at 1186-87.

63. *Id.* at 1186 (citing Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621 et seq. (1985))).

64. *Id.* (citing Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101 et seq. (Supp. 1994))).

65. *Id.*

66. *Id.* at 1189-90 (citing *Howard*, 414 A.2d at 1274).

67. It is equally difficult to see how the reasoning Judge Devine employed in *Kopf* would not also have supported dismissal of the wrongful discharge claim in *Godfrey*, but that is a question for another day.

Also for another day is a deeper analysis of the cast of characters who litigated *Godfrey* and *Wenners*. The defendant in *Godfrey* was represented by Attorney Edward M. Kaplan who argued, unsuccessfully, that "a wrongful discharge claim cannot be premised upon a public policy embodied in a statute which provides a remedy for its violation." 794 F. Supp. at 1187. It would seem to be less than coincidental, then, that it was Attorney David L. Nixon – Attorney Kaplan's opponent in *Godfrey* – who argued for the defendant in *Wenners* that "where a statutory remedy exists, no common law cause of action can lie." 663 A.2d at 625. And, perhaps even more interestingly, an argument that Attorney Kaplan could likely have won with while representing the defendant in *Godfrey*, that possess-

IV. *WENNERS*' TWO SHADOWS

At least partially as a result of the First Circuit's opinion in *Smith*, the story of *Wenners* is a tale of two shadows; application of *Wenners* has resulted in the dismissal of a common law cause of action in no fewer than seven published and unpublished opinions of the United States District Court for the District of New Hampshire, while across the river, in the New Hampshire Supreme Court, defendants relying upon *Wenners* to secure dismissal of a common law cause of action have been uniformly unsuccessful.

A. *Among the Federales*

In the district court, the shadow cast by *Wenners*, as illuminated by *Smith*, is large and somewhat complicated; in one case, *Wenners* was held not to bar a state claim for wrongful termination while in seven others, three different rationales, each rooted in *Wenners* and/or *Smith*, have been used to foreclose state common law claims for wrongful termination.

1. *State Claim not Barred in* Miller

In a district court case decided after *Smith* was argued, but before the opinion was issued, Judge Devine was confronted with a plaintiff who claimed she was terminated in violation of Title VII and the ADA, and who also brought state claims for wrongful termination and intentional infliction of emotional distress.[68] Specifically, she claimed that her employer "discriminated against her on the basis of her association with her oldest son, who has Down's Syndrome."[69] Regarding her wrongful termination claim, she alleged that "she was terminated, in part, because she requested time off from work in order to accompany her disabled child to speech therapy,"[70] an act which, in her view, was "encouraged by the public policy articulated in the preamble to the ADA and in the Family and Medical Leave Act."[71] The defendants moved to dismiss the wrongful termination claim, arguing that the plaintiff "failed to state a viable public policy claim as the alleged 'public policy' derive[d] from . . . her status as mother of a disabled child."[72]

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ing a particular status is not an act that public policy would encourage, was used against him, successfully, when he represented the plaintiff in *Kopf*.

68. *Miller v. CBC Cos.*, 908 F. Supp. 1054, 1058 (D.N.H. 1995).
69. *Id*. at 1058-59.
70. *Id*. at 1065 (citation and internal quotation marks omitted).
71. *Id*. (citing 29 U.S.C. §§ 2601 et seq. (1988 & Supp. V 1993)).
72. *Id*. at 1065-66.

In denying the defendants' motion to dismiss, Judge Devine quoted the rule from *Wenners* that "a plaintiff may not pursue a common law remedy where the legislature intended to replace it with a statutory cause of action,"[73] and derived from *Wenners* the same rule that was stated in *Smith*: "Such an intent [to replace a common law remedy] is indicated when a statute provides a remedy for its violation and sets forth procedures for pursuing such action."[74] Judge Devine went on to note that neither Title VII nor the ADA provided remedies under the facts that plaintiff alleged[75] – termination for requesting time off to take her disabled son to speech therapy – and he took great care to distinguish the plaintiff in his case, who alleged she was terminated for performing a specific act, from the plaintiff in *Kopf*, who based his wrongful termination claim on his status rather than an act he performed.[76] Finally, in addition to ruling that the plaintiff's wrongful termination claim was not barred by the rule in *Wenners*, Judge Devine went on to rule that despite the fact that Congress had yet to pass the Family and Medical Leave Act of 1995 ("FMLA") at the time the plaintiff was terminated, "a reasonable juror could conclude that at that time in New Hampshire a nonstatutory public policy existed that would protect employees seeking leave to take care of their disabled children."[77]

2. *Echoes of* Howard *in* Cooper *and* Jaffe

In both *Cooper v. Thompson Newspapers, Inc.*[78] and *Jaffe v. Catholic Medical Center*,[79] wrongful termination claims were dismissed in opinions that paid due homage to *Wenners* and *Smith*, but were rooted much more firmly in the reasoning of *Howard*.

Cooper involved a terminated employee who brought suit under Title I of the ADA, the Family and Medical Leave Act, and the common law of wrongful termination.[80] Apparently believing that the availability of remedies under the ADA and the FMLA precluded her wrongful termination claim, the plaintiff explained that "her wrongful termination claim [was] not predicated on her claims that she was discharged because of her perceived disability and in retaliation for taking leave,"[81] arguing, to the contrary, that her employer "violated public policy by soliciting and exagger-

73. *Id*. at 1066 (quoting *Wenners*, 663 A.2d at 625) (quotations omitted).
74. *Id*. (citing *Wenners*, 663 A.2d at 625).
75. *Id*.
76. *Id*. at 1066 n. 18.
77. *Id*. at 1066.
78. 6 F. Supp. 2d 109 (D.N.H. 1998).
79. 2002 WL 31466416 (D.N.H. Nov. 4, 2002).
80. 6 F. Supp. 2d at 111.
81. *Id*. at 115.

ating the complaints against her"[82] by various customers, which, in the employer's view, justified Cooper's termination.[83] Judge Devine dismissed the wrongful termination claim, on grounds that "Cooper [had] not identified an act on her part that public policy would encourage."[84] In so ruling, the judge noted that "[t]he second element [of a wrongful termination claim], which Cooper ignores, requires that the employee performed a protected *act*,"[85] and he reiterated the New Hampshire Supreme Court's rejection of the idea that an employee's status, rather than her actions, could support a wrongful termination claim.[86] Cooper's claim failed because she, like so many other wrongful termination plaintiffs, focused on the ways in which her employer's actions, rather than her own, allegedly violated public policy.

Because Judge Devine dismissed Cooper's claim for failing to allege that she had performed a protected act, he had no need to apply the rule stated in *Wenners*. Nonetheless, he turned to *Smith*, and imported into his opinion *Smith*'s misstatement of *Wenners*: "The United States Court of Appeals for the First Circuit has stated that under New Hampshire law, the existence of [a statutory] remedy precludes . . . a common law claim for wrongful discharge."[87] As I have already explained, the idea that a common law cause of action is precluded by the mere existence of a statutory remedy, rather than an expression of legislative intent to replace a common law cause of action, was proposed by the plaintiff in *Wenners*, but was not the holding of the *Wenners* Court, which stated a more stringent rule, requiring "clear statutory intent to supplant the common law cause of action."[88]

In *Jaffe*, Judge DiClerico reached a result similar to that reached by Judge Devine in *Cooper*. The plaintiff in *Jaffe*, a discharged physician, sued under the ADA and brought pendent state law claims alleging breach of contract and wrongful termination.[89] In his wrongful termination claim, the plaintiff alleged

> that he was fired in bad faith or "in violation of the public policy that governs employer-employee relations generally and that governs such relationships when the employee, like plaintiff, is a doc-

82. *Id*.
83. *Id*. at 111-12.
84. *Id*. at 115.
85. *Id*. (emphasis in the original).
86. *Id*.
87. *Id*. (quoting *Smith*, 76 F.3d at 429) (internal quotations omitted).
88. *Wenners*, 663 A.2d at 625 (citations omitted).
89. 2002 WL 31466416 at *1.

> tor who has patients that may be affected by the employer's wrongful conduct."[90]

The plaintiff further elaborated his public policy argument, asserting that he was terminated

> without regard to the policy that militates against such a termination due to its affect [sic] upon a doctor's relationship with his patients, in an improper attempt to "steal" plaintiff's practice from him by taking advantage of plaintiff's health problems and perceived physical issues to concoct a reason to trigger the termination clause in the contract.[91]

After noting that the plaintiff's allegations concerning the defendants' attempt to steal patients was not included in the complaint, Judge DiClerico ruled that the plaintiff failed to state a claim because he did not "allege facts that show that he was terminated because he performed a protected act or refused to do something that public policy would condemn."[92] Like Judge Devine in *Cooper*, Judge DiClerico stated, but did not rely upon, the *Smith* panel's misstatement of *Wenners*.[93]

3. Nedder *and* Dube*: Two Horses of a Different Color*

In contrast to *Cooper* and *Jaffe*, two cases in which the correct reasoning was used to reach the right result, *Nedder v. Rivier College*[94] and *Dube v. Hadco Corp*.[95] are cases in which Judge Devine reached the correct result, but for the wrong reasons.

In *Nedder*, a former college professor claimed she was fired because of her obesity.[96] She sued under the ADA, and pressed pendant state claims for breach of contract, wrongful discharge, and violation of New Hampshire's Law Against Discrimination.[97] In the section of his order dismissing the plaintiff's wrongful discharge claim, Judge Devine did not rely on the plaintiff's failure to allege an act on her part that triggered her termination, despite his previous discussion of the distinction in New Hampshire law between terminations based upon an employee's acts, which can give

90. *Id*. at *2 (quoting Compl. ¶ 46).
91. *Id*. at *3 (quoting Obj. ¶ 18).
92. *Id*. (citing *Karch v. BayBank FSB*, 794 A.2d 763, 774 (N.H. 2002)).
93. *Id*. at *2 ("A plaintiff may not maintain a New Hampshire wrongful discharge claim if the same claim is addressed by a statutory cause of action such as the ADA.") (citing *Cooper*, 6 F. Supp. 2d at 115; *Smith*, 76 F.3d at 429).
94. 944 F. Supp. 111 (D.N.H. 1996).
95. 1999 WL 1210885 (D.N.H. Feb. 4, 1999).
96. 944 F. Supp. at 119-20.
97. *Id*. at 113.

rise to a wrongful termination claim, and terminations based upon her status, which are not actionable under the common law of wrongful termination.[98] Rather, he began by correctly quoting the rule from *Wenners*,[99] then analogized to *Smith*,[100] and "conclude[d] that Nedder's wrongful discharge claim [was] precluded because of the availability of a remedy under the ADA."[101] But again, *Wenners* stands for the proposition that legislative intent to displace a common law remedy – not the mere creation of a statutory remedy – precludes a wrongful discharge claim, and in stating that rule, the *Wenners* Court never said that the creation of a statutory remedy, without more, is sufficient to signal a legislative intent to displace common law causes of action.

Dube is in many ways similar to *Nedder*. In *Dube*, the plaintiff brought a Title VII sexual harassment claim along with state claims for defamation and wrongful discharge.[102] Among other things, Dube claimed that she was terminated because she entertained several of her employer's customers – visiting businessmen from Japan – after hours, and because of rumors circulating through the company regarding her evening with the Japanese businessmen.[103] As in *Nedder*, Judge Devine quoted *Smith*'s misstatement of *Wenners*[104] and used that misstatement to dismiss the plaintiff's claim "[t]o the extent [it was] based upon her contention that her termination was motivated by gender discrimination."[105]

Rather than relying upon *Smith*, Judge Devine could have, and probably should have, turned to the action/status distinction he used to such good effect in *Cooper*. What makes that omission so curious in *Dube* is the fact that one paragraph after he quoted *Smith*'s misstatement of *Wenners*, Judge Devine went down the correct path in analyzing the plaintiff's claim that she had been terminated because she entertained her company's customers after hours:

> In this case Dube, apparently cognizant of the fact that such an argument could not pass the straight-face test, has not argued in her opposition to summary judgment that an identifiable public policy exists that would encourage her to go out to dinner with Japanese businessmen.[106]

98. *See Cooper*, 6 F. Supp. 2d at 115.
99. *Nedder*, 944 F. Supp. at 121.
100. *Id.*
101. *Id.*
102. 1999 WL 1210885 at *1.
103. *Id.* at *3.
104. *Id.* at *9.
105. *Id.*
106. *Id.*

What remains unclear from the opinion in *Dube* is whether the factual allegations concerning termination for entertaining the Japanese businessmen was a part of, or independent from, the plaintiff's assertion that her termination was motivated by gender.

4. *Adding Retaliation to the Mix:* Phelan, Weeden, *and* Fernandes

Cooper, *Jaffe*, *Nedder*, and *Dube* are all cases that were (or should have been) decided under the principle enunciated in *Howard* – wrongful termination requires a termination resulting from an employee's actions, not his or her status – or under a traditional wrongful termination analysis focusing upon the existence (or lack thereof) of a public policy supporting the employee's action. In other words, because those cases did not depend upon the *Wenners* rule, any reference to the *Smith* majority's misreading of *Wenners* is ultimately insignificant. But the three cases discussed in this section present a different situation, and one in which reliance upon *Smith* is potentially consequential, because *Phelan v. Town of Derry*,[107] *Weeden v. Sears, Roebuck & Co.*,[108] and *Fernandes v. TPD, Inc.*[109] all involved claims by plaintiffs that they were fired in retaliation for exercising rights they enjoyed under federal statutes. That is, the plaintiffs in these three cases all asserted that they were terminated for their actions, not their status, and that federal statutes provided the basis for claiming that they had acted in accordance with public policy. Thus, unlike the claims in the four cases discussed in the previous two sections, the claims in *Phelan*, *Weeden*, and *Fernandes* could not have been dismissed without relying on *Smith*.

Phelan involved a claim brought under the FMLA along with state claims for wrongful discharge and intentional infliction of emotional distress.[110] As Judge DiClerico described the arguments regarding a motion for judgment on the pleadings filed by one of the defendants:

> The Library contends that the FMLA preempts Phelan's state common law cause of action for wrongful discharge based upon her allegations that she was fired for exercising her rights under the FMLA. Phelan argues that the FMLA was not intended to supplant existing state law remedies so that her FMLA claim does not preclude her wrongful discharge claim based on FMLA rights.[111]

107. 1998 WL 1285898 (D.N.H. Dec. 9, 1998).
108. 1999 WL 1209494 (D.N.H. May 25, 1999).
109. 2000 WL 1466108 (D.N.H. Jan. 7, 2000).
110. 1998 WL 1285898 at *1.
111. *Id.* at *2 (footnote omitted).

Judge DiClerico disagreed: "Phelan's objection to preclusion is contrary to settled law."[112] Interestingly, Phelan identified the correct test – legislative intent to supplant common law remedies, rather than the existence of a statutory remedy – but in ruling that Phelan's "state law claim for retaliatory discharge [was] precluded by the remedy afforded by the FMLA,"[113] Judge DiClerico noted:

> The statutory language Phelan cites does not support her argument. The cited provisions state that the FMLA is not to be construed to supersede state or local law providing greater *leave rights* than the FMLA but the provisions are silent as to state law *remedies* addressing violations of the FMLA.[114]

While one might reasonably argue that Congressional silence regarding the replacement of common law remedies suggests that Congress did not intend to displace such remedies, Judge DiClerico's decision was all but required by the statement in *Smith* that the existence of a statutory remedy is enough to preclude common law remedies, which is, in turn, based upon *Smith*'s (mis)understanding that under *Wenners*, the mere creation of a statutory remedy is enough to signal legislative intent to supplant common law causes of action.

Like *Phelan*, *Weeden* involved an FMLA claim coupled with a wrongful discharge claim in which the plaintiff claimed he was discharged for exercising his rights under the FMLA.[115] Relying upon his decision in *Phelan* and Judge Devine's decision in *Cooper*, Judge DiClerico granted the defendant judgment on the pleadings on the wrongful discharge claim.[116] Three things are noteworthy about the opinion. First, Judge DiClerico characterized *Smith* as answering "the question of whether [a wrongful discharge] cause of action lies where, as here, the public policy at stake is codified in a statute that itself provides a private right of action to remedy transgressions."[117] Second, after paraphrasing the holding from *Phelan*, "that a wrongful discharge cause of action does not lie where the claim arises from an employer's retaliatory termination of an employee for exercising her rights under the FMLA,"[118] Judge DiClerico went on to note

112. *Id*. at *2 (citing *Cooper*, 6 F. Supp. 2d at 115; *Smith*, 76 F.3d at 429; *Wenners*, 663 A.2d 623; *Gearhart v. Sears, Roebuck & Co*., 27 F. Supp. 2d 1263, 1278 (D. Kan. 1998); *Vargo-Adams v. U.S. Postal Serv*., 992 F. Supp. 939, 944 (N.D. Ohio 1998); *Hamros v. Bethany Homes*, 894 F. Supp. 1176, 1179 (N.D. Ill. 1995)).

113. *Phelan*, 1998 WL 1285898 at *2.

114. *Id*. at *2 n. 2 (emphasis in the original).

115. 1999 WL 1209494 at *3 n. 1.

116. *Id*. at *4.

117. *Id*. at *3 (quoting *Smith*, 76 F.3d at 428-29).

118. *Id*. (footnote omitted) (citing *Cooper*, 6 F. Supp. 2d at 115).

that "[t]o the extent that New Hampshire superior courts hold to the contrary, the court finds such holdings unpersuasive."[119] Finally, in response to the plaintiff's argument "that under *Wenners*, a court must consider whether the legislature intended to supplant a common law remedy with a statutory remedy,"[120] Judge DiClerico, adopting the reasoning of *Smith*, explained: "In this case the factors considered by the *Wenners* court would indicate a clear intent to supplant. The FMLA not only provides a statutory prohibition, but it also provides a remedy and procedures for pursuing statutory violations."[121] While Judge DiClerico could have construed *Wenners* differently, i.e., as identifying several factors that demonstrate the *lack* of a legislative intent to preclude rather than stating a test for determining whether the legislature *did* intend to preclude common law remedies, a more correct reading of *Wenners* was fairly well foreclosed by *Smith*.

In light of *Phelan* and *Weeden*, *Fernandes* is an unremarkable opinion. In that case, Judge DiClerico construed the plaintiff's wrongful discharge claim "as one for retaliatory discharge in violation of Title VII"[122] and then dismissed it, with little discussion, as precluded by *Smith* and *Cooper*.[123] In so doing, he characterized *Smith* as holding that "[a] plaintiff may not seek a common law remedy for wrongful termination under New Hampshire law where the same claim is addressed by a statutory cause of action such as Title VII."[124]

The shadow cast in the district court by *Smith*'s interpretation of *Wenners* is long and dark. In *Nedder* and *Dube*, the siren song of *Smith* inspired Judge Devine to bypass the correct grounds for dismissal, and in *Phelan*, *Weeden*, and *Fernandes*, *Smith*'s misreading of *Wenners* supported the dismissal of claims that probably should not have been dismissed.

B. *Meanwhile, Back in the State Courts*

While New Hampshire's United States District Court has dismissed no fewer than seven wrongful termination claims, and at least three of them in direct reliance upon *Smith*, the New Hampshire Supreme Court has gone in the opposite direction, ever narrowing the circumstances in which a statutory cause of action deprives a plaintiff of a common law claim.

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119. *Id*. (footnote omitted).
120. *Id*. at *3 n. 2.
121. *Id*.
122. *Fernandes*, 2000 WL 1466108 at *7.
123. *Id*.
124. *Id*.

In *Powell v. Catholic Medical Center*,[125] the first New Hampshire Supreme Court opinion to call into question the scope of *Wenners*, the plaintiff was a phlebotomist employed by Catholic Medical Center who was assaulted and injured by a patient from whom she attempted to draw blood.[126] She sued both the hospital and the patient's treating physician, and won a jury verdict, on a common law claim of failure to warn.[127] On appeal, the defendants argued "that the plaintiff's common law duty to warn claim was preempted by RSA 329:31."[128] The defendants relied upon the following portion of that statute:

> A physician licensed under this chapter has a duty to warn of, or to take reasonable precautions to provide protection from, a client's violent behavior when the client has communicated to such physician a serious threat of physical violence against a clearly identified or reasonably identifiable victim or victims, or a serious threat of substantial damage to real property.[129]

After quoting the rule from *Wenners*, the Supreme Court held that the foregoing "statutory language does not evidence an 'intent to replace' the common law claim in this case."[130] Rather, in the view of the Court, "the statute does not explicitly preempt all common law claims for a physician's failure to warn [but] merely preempts the common law claims addressed by its language,"[131] while leaving intact all other common law claims, such as the one in that case, where the defendants were charged with knowledge of the patient's general dangerousness, but "the patient did not communicate an intent to harm an identified or identifiable victim."[132]

What is interesting about *Powell* is its rejection of the plaintiff's argument that N.H. Rev. Stat. Ann. § 329:31 implicitly preempted the common law cause of action.[133] According to the Court, the statute concerned "a physician's duty to warn of a client's violent behavior when the client has communicated a serious threat of physical violence against a clearly identified or reasonably identifiable victim"[134] but, through its silence regarding threats posed by dangerous patients who do not communicate threats against identifiable victims, left untouched any common law cause of ac-

125. 749 A.2d 301 (N.H. 2000).
126. *Id*. at 303.
127. *Id*.
128. *Id*.
129. *Id*. at 304 (quoting N.H. Rev. Stat. Ann. § 329:31 (I) (1995)).
130. *Id*.
131. *Id*.
132. *Id*.
133. *Id*. at 304-05.
134. *Id*. at 305.

tion that might be available to those injured by such patients. Rather than adopting the defendants' theory that N.H. Rev. Stat. Ann. § 329:31 implicitly repealed the common law,[135] the Court relied upon the doctrine of field preemption,[136] and identified the preempted field not as physician responsibility for injuries inflicted by their dangerous patients, but as physician responsibility for injuries inflicted by their dangerous patients who have identified the potential targets of their violent acts.[137] The Court's use of a preemption analysis (and its narrow framing of the preempted field) provide an interesting contrast to *Smith*, in which the First Circuit made due without a formal preemption analysis and required only "a private right of action [and] . . . a mature procedure for pursuing such an action"[138] to signal legislative intent to displace a common law remedy.[139]

The trend begun in *Powell* reached its zenith in *Bliss v. Stow Mills, Inc.*,[140] another case from the familiar realm of wrongful discharge. In *Bliss*, a truck driver was terminated after refusing to run a particular route he claimed was too long to be completed within the time limits mandated by the federal Surface Transportation and Assistance Act of 1982 ("STAA"), and threatening to tell federal authorities about the allegedly unlawful route.[141] The driver sued, asserting, *inter alia*, a common law claim for wrongful discharge.[142] The trial court dismissed the wrongful discharge claim on grounds that it was preempted by the STAA.[143] As the Supreme Court explained the operation of the STAA:

> In order to encourage the reporting of safety violations, the STAA affords drivers who refuse to break the law or drive vehicles they believe to be unsafe some degree of protection from retaliatory actions by employers. *See Brock v. Roadway Express, Inc*., 481 U.S. 252, 258 (1987); 49 U.S.C. § 31105. Section 31105 of the STAA states:

135. *Id*. at 304.
136. *Id*. at 305 (citing *Boston & Me. R.R.*, 86 A. at 359).
137. *Id*.
138. *Smith*, 76 F.3d at 429.
139. *Id*. It is tempting to speculate that the *Smith* majority, which turned a negative statement from the dictum in *Wenners* into an affirmative rule, would have determined, if faced with the facts of *Powell*, that the legislature's determination to impose a duty upon physicians to warn of threats to identifiable victims also indicated its intention to relieve physicians of any duty to warn when a potentially dangerous patient did not communicate a threat, or communicated a threat that was not directed toward identifiable victims.
140. 786 A.2d 815 (N.H. 2001).
141. *Id*. at 816.
142. *Id*. at 817.
143. *Id*.

> (a) Prohibitions. – (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because – (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or (B) the employee refuses to operate a vehicle because –
>
> > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> >
> > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
>
> An employee who alleges a violation of subsection (a) "may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred." 49 U.S.C. § 31105(b). Section 31105 provides the procedures to be followed should an employee file such a complaint.[144]

Despite the fact that the STAA "codifies the public policy"[145] in favor of reporting unsafe interstate trucking practices and "also creates a private right of action to remedy violations of that policy and limns a mature procedure for pursuing such an action,"[146] the Supreme Court flatly rejected "the defendant's argument that where a statutory remedy exists, no common law cause of action can lie."[147] Moreover, it did so *after* conducting a full-scale preemption analysis, explaining: "our preemption analysis includes a detailed examination of the express and implied intent of Congress and we find it unnecessary to revisit the same issue under the common law rule cited in *Wenners*."[148]

The one-paragraph disposition of the defendant's *Wenners* argument in *Bliss* is noteworthy for several reasons. First, *Bliss* stands *Wenners* on its head. In *Wenners*, the Court dealt first with the defendants' statutory preclusion argument and then turned to their preemption argument. By contrast, in *Bliss*, the Court first considered the preemption argument and then turned to statutory preclusion. More importantly, by ruling that its pre-

144. *Id*. (parallel citations omitted).
145. *Smith*, 76 F.3d at 429.
146. *Id*.
147. *Bliss*, 786 A.2d at 820.
148. *Id*.

emption analysis also disposed of the defendant's preclusion argument, the Court answered a question that was left open in *Wenners*, namely what constitutes a sufficient showing of legislative intent to replace a common law remedy with a statutory cause of action. The *Bliss* Court's answer, that statutory preclusion is demonstrated by the same showing necessary to establish preemption, would appear to be the death knell for *Smith*, in which the First Circuit established a considerably lower threshold for statutory preclusion than the standard for preemption. Because of the saving provision in Title VII, that statute could not possibly be construed as preempting state anti-discrimination law, and, following the reasoning of *Bliss*, if Congress did not intend to preempt state law, it could not have intended to replace state common law remedies with a statutory cause of action. In short, the conclusion is inescapable that *Bliss* consigns *Smith* to the scrap heap and, in all likelihood, rehabilitates *Godfrey*.

V. CONCLUSION

If nothing else, the twisted history of *Wenners* and *Smith* demonstrates the mischief inherent in ill-considered dictum. In both cases, and several more in the *Wenners-Smith* line, there was no need to plow the ground covered by the *Wenners* rule because the plaintiffs' wrongful termination claims failed for a more fundamental reason: failure to allege an act on the part of the plaintiff that was supported by public policy. Had *Wenners* been decided on that basis, as it should have been, then perhaps the *Smith* majority would not have been inspired to craft the rule that was ultimately undone by *Bliss*. So, on the one hand, *Wenners* and *Smith* may be faulted for saying too much. But, on the other hand, *Wenners* might also be faulted for saying too little, when it identified "no clear statutory intent to supplant the common law cause of action"[149] in the case before it but never went on to discuss precisely what evidence would indicate a "clear statutory intent." The silence on that point in *Wenners* explains, to some extent, why the *Smith* majority took on the task of mining *Wenners* for the additional nuggets of dictum from which it constructed its now discredited test. So, to conclude, the real lesson of the *Wenners-Smith* line of cases would seem to be a variation on Goldilocks and the three bears: some opinions say too much, and some opinions say too little, while the best opinions are those that say neither too much nor too little and in so doing, get it just right.

149. 663 A.2d at 625.